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XI.—Oral and Written Pleading in Athenian Courts

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ACTIONS at law in the courts of Athens were commenced, in the ordinary course of procedure, by the plaintiff's summons to the defendant to appear before a magistrate.¹ The next step was the filing of the first pleading, the complaint.² There are a number of cases from the time of Demosthenes, including both public and private actions, in which the plaintiff in person hands in a written complaint to the magistrate, or to his clerk or a deputy.³ This was no doubt the customary procedure of the time. That it was so fixed by legal enactment has yet to be proved, though this may perhaps be inferred from the procedure that was followed in filing with the *εὐθύναι* complaints against officials.⁴ The time at which this method of filing complaints was introduced has not been established. In fact all discussions of Athenian procedure, from that of Heffter in 1822 to the recent work of Lipsius, assume that it was followed without variation throughout the entire period covered by our sources.⁵ In none of them, so far as I am able to discover, is any attempt made to trace the steps by which the original *viva voce* proceedings were replaced by the documentary pleadings of the Demosthenic period. It is surprising that the inquiry was not suggested by Bonner's discovery—published only in 1905—that the rule requiring evidence to be presented in writing was not enacted until the fourth century,⁶ or by the circumstance that even in the late

¹ Lipsius, *Att. Recht*, 804 ff.

² *Ib.* 815 ff.

³ The cases are cited and discussed *infra*, pp. 188 ff.

⁴ Arist. *Const. Ath.* 48, 4: *γράψας εἰς τινάκιον λελευκωμένον . . . διδωσιν τῷ εὐθύνῳ.*

⁵ Heffter, 280, 283 f.; Platner, 1, 119 ff.; Meyer-Schömann-Lipsius, *Att. Prozess*, 790 ff. (Schömann's account); Lipsius, *Att. Recht*, 815 ff.

⁶ *Evidence*, 46 f.; Leisi, *Der Zeuge im attischen Recht* (Frauenfeld, 1908), 85 ff. For the details of this problem, cf. *infra*, pp. 190 ff.

Demosthenic period the phrase *γραφὴν ἀποφέρειν* is rarely found, and *ἀποφέρειν* alone still more rarely. Had it been customary to file complaints in writing during the entire period represented by our sources, we should expect to find *ἀποφέρειν* in more general use by the time of Demosthenes.

Before entering upon a detailed examination of the evidence, it may be well to set down certain data, the validity of which rests upon well-established facts or can be demonstrated without an exhaustive study of the sources.

1. The beginnings of the administration of justice among the Greeks are earlier than the use of writing.⁷ It may therefore be assumed that the Athenian judicial system, for which the highest antiquity was claimed,⁸ had its beginnings in a time when even the general principles on which disputes were judged were unwritten.

2. After the introduction of written law there was still a time during which the procedure was entirely oral and there was absolutely no use of written instruments in connection with pleading, evidence, or judgment.⁹

3. There was a considerable time during which public actions were entered in writing, but private actions not. This is shown by the distinction commonly made between *γραφή* and *δίκη*.¹⁰

4. The appearance of *γραφή* and *γράφεσθαι* in the technical legal sense does not necessarily imply an instrument written by the plaintiff and handed in to the magistrate. In fact, the unvarying use of the middle, *γράφεσθαι*, justifies the inference that these terms refer originally to the execu-

⁷ Without entering into a discussion of the time at which writing was first used by the Greeks, it may be observed that written laws have no place in the primitive manifestations of judicial activity that are observed in the Homeric and Hesiodic poems. Cf. Bonner, "Administration of Justice in the Age of Homer," *Class. Phil.* VI (1911), 12 ff.; "Administration of Justice in the Age of Hesiod," *ib.* VII (1912), 17 ff.

⁸ Aelian, *V. H.* III, 38; Isoc. 4, 39 f.

⁹ An excellent illustration of this stage of legal development is afforded by the laws of Gortyn, in which the procedure is entirely oral (*Rec. insc. jur. gr.* I, 432, 435).

¹⁰ Lipsius, 240, n. 9.

tion of an instrument by the magistrate or some other court functionary at the plaintiff's instance and not by the plaintiff himself. For the middle here either must have meant originally to write for one's own use, 'note down,' 'jot down,'¹¹ or must be the so-called causative.¹² The second explanation, which we should be tempted to prefer merely on the score of general probability, is made fairly certain by the analogy with a large number of legal terms in which the middle is to be explained in this way.¹³ Furthermore, it seems to be more in accordance with the natural course of development that the earliest use of writing in legal procedure should be ascribed to the court officials and not to the litigants. We may therefore conclude that for a time after the introduction of writing into judicial proceedings the *γραφή* was not handed in by the plaintiff, but was written by the magistrate, his deputy, or a clerk.

5. It follows from the preceding conclusion that *γραφή* as a technical legal term originally signified the instrument, whatever may have been its nature and purpose, that was written out by an officer of court upon the plaintiff's application. The identity of this original *γραφή* with the complaint is not yet established. But there is no good reason for denying it, and it is *a priori* likely that the technical meaning which attaches to *γραφή* from its first appearance in the sources is the original meaning. Furthermore, the form in which complaints were drawn, both in the fifth and fourth centuries, makes it extremely likely that the written com-

¹¹ This use of *γράφεσθαι* is fairly common; one should add to the instances cited in Liddell and Scott at least the excellent examples in Ar. *Wasps*, 537, 576, and some cases of bankers' memoranda of accounts, e.g. [Dem.] 49, *passim*.

¹² Kühner-Gerth, II, I (1898), 108: “*γράψασθαι τίτα*, einen anklagen (eigtl. den Namen des Angeklagten für sich niederschreiben lassen).”

¹³ The middle is commonly used where a litigant has the authorized official take action, e.g., *ἀνακρίνειν* of the magistrate, *ἀνακρίνεσθαι* of the litigant (Dem. 21, 103), *καταδιαιτᾶν* of the magistrate, *καταδιαιτάσθαι* of the litigant (Lys. 25, 16). This distinction of usage may be illustrated *ad libitum* from the occurrences of *δικάζεσθαι* and its compounds and the compounds of *γράφεσθαι*. I hope in the near future to publish a detailed study of the use of the active and middle voices in verbs of legal action.

plaint originated in an official memorandum of the action.¹⁴ We may conclude, I think, without hesitation that the first written instrument to appear in Athenian procedure, the *γραφή*, is the complaint.

6. In the time of Demosthenes, as has been observed,¹⁵ the complaint was presented to the magistrate in writing both in public and in private actions.

Our problem is seen to resolve itself into a number of specific questions. At what time were complaints in public actions first reduced to writing? When was this practice extended to private actions? And when did the filing of a written complaint by the litigant replace the earlier method of commencing actions, in which the complaint was written down by some functionary of the court?

The time at which the complaints were first written is unquestionably earlier than 425, for *γραφή* is twice used of public actions in the *Acharnians*.¹⁶ It occurs repeatedly with this meaning in the three following plays of Aristophanes,¹⁷ and is found in the Pseudo-Xenophontic treatise *On the Constitution of Athens*.¹⁸ There are also several instances of *γράφεσθαι* in the technical legal sense, with or without *γραφήν*, in the plays of this period.¹⁹ When we look for evidence concerning private actions, we find in the *Knights*, which was produced in 424, the phrase *ὑπογραφεὺς δίκων*.²⁰ In the *Clouds*, produced in the following year, we have an interesting allusion to the writing of a private suit.²¹ In the first speech of Antiphon the complaint in a homicide action is termed *γραφή*,²² and we find the phrase *δίκην γράφεσθαι* in

¹⁴ See, for example, Dem. 45, 46; 37, 22 ff.; Ar. *Wasps*, 894 ff., where there can be little doubt that the parody is modeled faithfully on the form of a genuine complaint; Arist. *Const. Ath.* 48, 4, where is described a form of complaint to be filed with the *εὐθυνού*. In Dem. 37, 22 ff. the complaint has developed into a document of truly formidable proportions.

¹⁵ *Supra*, p. 177.

¹⁶ 679, 714.

¹⁷ *Knights*, 306 (but cf. Van Leeuwen, *ad loc.*), 442; *Clouds*, 1481; *Wasps*, 842, 894, 907. The word is found repeatedly in Antiphon. On *γραφάς*, in *Wasps*, 848, cf. *infra*, p. 182, n. 26.

¹⁸ 3, 2.

¹⁹ *Clouds*, 1482; *Wasps*, 881, 894, 907; *Peace*, 107.

²⁰ 1256.

²¹ 759-774.

²² 2. Cf. Lipsius, 125 ff., 602 f., for the form of the action.

the speech of Isocrates *Against Callimachus*.²³ There can be no question that complaints in both public and private actions were written during the last quarter of the fifth century, but we cannot say how long this had been the custom. It would be unsafe to base a conjecture upon the laws of Gortyn, which appear to date from the middle of the fifth century and provide for a *viva voce* system of pleading, for the development of writing in Crete was much slower than in Attica.²⁴ There is likewise no way of determining the length of time that intervened between the appearance of the written complaint in public actions and its extension to private suits.

We have now to inquire whether at this time the complaint was written by an officer of court or by the plaintiff. In Aristophanes there are two allusions to writing in connection with the commencement of actions.²⁵ In both the writer appears to be a functionary of court. The passage from the *Clouds* in particular seems to admit of no thoroughly satisfactory interpretation which does not involve the assumption that the clerk is writing down a complaint. Strepsiades says that, if an action were being entered against him, he would get a burning-glass, and, while the clerk was writing down the action, would get between him and the sun and melt out the writing that constituted the record of his case. He then rejoices that the action has been canceled out. It may be objected that his words possibly do not refer to the writing of the complaint from an oral statement, and that the clerk is merely copying the complaint in order to post it. To this it may be replied, first, that the document the clerk is writing is supposed to be the only record of the case and the whimsical conceit of Strepsiades loses all point if we assume that the clerk was merely copying the complaint. In the second place, it is highly improbable that the clerk, if he were preparing the copy for posting, would be writing on a waxen tablet; the notices that were posted by magis-

²³ 12.

²⁴ *Supra*, p. 178. On the development of writing in Crete, cf. *Rec. insc. jur. gr.* I, 439.

²⁵ *Clouds*, 759-774; *Knights*, 1256. Cf. *supra*, p. 180.

trates and other public functionaries were uniformly written on whitened pieces of board, *σανίδες* or *λευκώματα*.²⁶ The fact that the complaint is entered with a clerk need cause no difficulty, for we know that actions could be filed with a clerk as well as with the magistrate or a deputy,²⁷ and also that magistrates and boards of magistrates were abundantly supplied with *γραμματεῖς* and *ὑπογραμματεῖς* even in the fifth century.²⁸

Again, the simplest and most natural interpretation of the expression *ὑπογραφεῖς δικῶν* in the *Knights* is that the poet has in mind the clerks whose duty it was to write down the complaints in actions at law. The Paphlagonian has just been deprived of the wreath that is the emblem of some official position — probably the *στρατηγία*. It has now been conferred upon Agoracritus. The speaker, beholding that personage in the moment of his triumph, wearing the insignia of his new dignity, cries out in admiration and begs to be made his clerk of court.²⁹

²⁶ Lipsius, 820. The *locus classicus* is Isoc. 15, 237. See also *Knights*, 979 (with Van Leeuwen's note); *Wasps*, 349. In the burlesque trial (*Wasps*, 839 ff.) of the dog, Bdelycleon brings in among the other paraphernalia for holding court *τὰς σανίδες καὶ τὰς γραφάς*, by which are to be understood the notices written on boards for posting and the other documents in the case, presumably written on ordinary tablets.

²⁷ In [Dem.] 58, 8 the complaint in a *φάσις* is filed with the *γραμματεῖς τῶν τοῦ ἐμπορίου ἐπιμελητῶν*.

²⁸ Cf. Antiphon, 6, 35. 49.

²⁹ Van Leeuwen is quite right, in my opinion, in taking *ὑπογραφεῖς δικῶν* merely as a comic variation of *γραμματεῖς* (note *ad loc.*). Rogers and Neil both dissent from this view, but their arguments are not impressive. Rogers thinks the phrase refers to one who "signs writs and indictments either (like the Latin *subscriber*) as second to his principal, or what is perhaps more likely, on behalf, and at the instigation, of his principal." This is pure assumption. I find no trace of the *subscriber* in Athenian process, and no evidence to show that Phanus was a sycophant attached to Cleon rather than a clerk. Neil makes the rather sweeping assertion that "*ὑπογραφεῖς* has nothing to do with *ὑπογραμματεῖς*." Possibly it has not, but we must ask for better proof than the ascription to *ὑπογραφή* in Plato, *Theaet.* 172 E and *ὑπογράψας* in Dem. 37, 23 of a technical legal meaning they do not have. In both passages the words connote a logical and not a legal process. To one of Neil's statements, however, we can heartily subscribe: "Symmachus' scholion is sensible (*φαλεραῖς τις γραμματεῖς οὐρος* · *τῶν πάνυ σπανίων θνομά κύριον*), and we know little more than he did."

However, in a question of such importance it is well not to rest our case upon the interpretation of one or two passages, especially when those passages are colored with the fantastic conceits of comedy. It will be more satisfactory to examine carefully the words and phrases that are used to describe the filing of actions at different periods in the fifth and fourth centuries, in order to ascertain whether or not there is any such change in their character as might betoken a change in the procedure to which they refer.³⁰

The instances of *γράφεσθαι* in Aristophanes have been noted.³¹ Other words that describe the commencement of actions are *δικάζεσθαι*,³² *καλεῖσθαι*,³³ and *προσκαλεῖσθαι*³⁴ — used apparently without any distinction of meaning, *διώκειν*,³⁵ and *ἐγκαλεῖν*.³⁶ Of the words that are associated with the special forms of action we note *φαίνειν*.³⁷ In none of the passages in which these words are found is anything that can be construed as an allusion to the writing or handing in by the plaintiff of a documentary complaint. There are two cases of the active *γράφειν* that deserve notice. In the course of the altercation between Pisthetaerus and the *ἐπίσκοπος* in the *Birds*, the latter exclaims *ἀπολῶ σε καὶ γράφω σε μυρλας δραχμάς*.³⁸ And in the *Plutus* Chremylus, arranging for the debate with Poverty, asks, *τί δῆτά σοι τίμημ' ἐπιγράψω τῇ δίκῃ, ἐὰν ἀλφός*;³⁹ Neither passage, in my opinion, affords any ground for the conclusion that at

³⁰ Many of the words that will be cited, e.g. *ἐπεξέρχεσθαι*, *διώκειν*, *απιᾶσθαι* often do not refer to the inception of an action. However, as it would not further our particular quest to raise this point, I shall in general consider all phrases that are primarily associated with the prosecution of actions. No attempt is made to present a complete index of these terms, though the citations from the earlier orators are fairly copious. The following paragraphs as a rule present the results of at least one careful reading of the texts cited.

³¹ *Supra*, p. 180.

³² *Clouds*, 496, 1141-42.

³³ *Clouds*, 1221; *Wasps*, 1335, 1416, 1445; *Birds*, 1046, 1425, 1455; *Eccl.* 864.

³⁴ *Clouds*, 1277; *Wasps*, 1334, 1406, 1417; *Birds*, 1426; *Frogs*, 578. Cf. *προσκλήσεις*, *Wasps*, 1041.

³⁵ *Ach.* 700 (pass.); *Knights*, 368 (mid.); *Wasps*, 902; *Eccl.* 452; fr. 382 D. Cf. *διωκάθω*, *Clouds*, 1482.

³⁶ *Birds*, 1455. ³⁷ *Ach.* 542, 819, 824 ff., 908 ff.; *Knights*, 300; cf. *Ach.* 938.

³⁸ 1052.

³⁹ 480 f.

this time litigants wrote and handed in their pleadings. In the first, the speaker is a magistrate who comes equipped with voting urns in token of his official powers; his threat is that he will enter a fine against Pisthetaerus.⁴⁰ In the second the poet evidently has in mind the drawing up of articles for a voluntary arbitration, where the penalty is fixed beforehand by agreement of the disputants, not proposed subject to the action of a court.⁴¹

Turning to Antiphon we find *δικάζεσθαι*,⁴² *προσκαλεῖσθαι*,⁴³ *διώκειν*,⁴⁴ *ἐπεξέρχεσθαι*,⁴⁵ *γράφεσθαι*,⁴⁶ and *αἰτιᾶσθαι*.⁴⁷ As regards the special forms of action, we note *ἐνδεικύναι* and *ἀπάγειν*,⁴⁸ *εἰσαγγέλλειν*,⁴⁹ *κατηγορεῖν εἰς τὰς εὐθύνας*.⁵⁰ The

⁴⁰ Cf. Lipsius, 974, n. 24. The expression *γράφω σε μηρίας δραχμάς* must mean 'I enter a fine against you,' and cannot, in my opinion, mean 'I propose a fine in the action in which I have cited you' (1046). It has troubled commentators for a century—"unnecessarily," says Rogers. But nothing could be more confusing than Rogers' own explanation, 'In the summons I give you, I write my claim at so much.' This involves the assumption that written summonses were used, for which I find no evidence even in the fourth century, and ascribes to *γράφω* a meaning of which I have been unable to find a single instance. The passage Rogers cites from Dinarchus (*Ag. Dem.* 110 Bekker; in most of our texts the words quoted are found in 108) is of course not a parallel at all. It refers to the moving of a resolution in the assembly, as may be seen by turning back a few pages and reading the context. Even in the period of written pleadings the middle is used of 'writing in' the *τίμημα*, which is thought of as *proposed* subject to the action of the court (cf. Arist. *Const. Ath.* 48, 4; Poll. VIII, 47; Aeschin. I, [16]). There is no need with Bergk to read *ἐγγράψω*, for in [Lys.] 9, 6 ff. an *ἐπιβολή* is not entered on a list, but written separately upon a *λεύκωμα*, which is afterwards called a *γραφή*. The multiplication of the ordinary *ἐπιβολή* by 200 is of course part of the fun. Kock's explanation (note *ad loc.*), followed by Van Leeuwen, is less simple, but does not, like that of Rogers, do violence to the Greek.

⁴¹ Cf. the very similar arrangements in *Ach.* 364 ff.; *Wasps*, 519 ff., where *ἐπιτρέπειν* is used; *Birds*, 440 ff.; *Frogs*, 612 ff., 810 ff. The reading *ἐπεγράψω* in R evidently results from the failure to perceive that this is a private agreement for arbitration and not a complaint in an action at law. From this and the preceding note it will be clear that I cannot accept the explanation of this passage advanced by Rogers, who should adduce in support of his argument, not "familiar instances" of the *τίμημα*, but an instance of the active *ἐπιγράψειν* or *γράφειν* in the sense in which he proposes to interpret it here.

⁴² 2, β, 12; 6, 49 (with *δικην*). ⁴³ 5, 13 (pass.). ⁴⁴ 2, α, 5; 6, *passim*.

⁴⁵ 2, α, 7; 6, 37. ⁴⁶ 2, α, 6 (pass.). ⁴⁷ 6, 34 (*bis*).

⁴⁸ 5, 9. 85 (both pass.). ⁴⁹ 6, 12. 35. 36. ⁵⁰ 6, 43.

commencement of a prosecution for homicide is ἐπισκήπτησθαι,⁵¹ or ἀπογράφεσθαι.⁵² Here is nothing to indicate that plaintiffs wrote and handed in complaints.

In the speeches of Andocides and the speech *Against Alcibiades* that is preserved with them we find δικάζεσθαι,⁵³ ἐπιδικάζεσθαι,⁵⁴ λαγχάνειν,⁵⁵ διώκειν,⁵⁶ ἐγκαλεῖν,⁵⁷ γράφεσθαι,⁵⁸ ἐνδεικνύναι,⁵⁹ ἐνδειξιν γίγνεσθαι,⁶⁰ ἀπάγειν,⁶¹ εἰσαγγέλλειν,⁶² μηνύειν,⁶³ μήνυσιν γίγνεσθαι.⁶⁴ An interesting question is raised by the appearance in connection with the last three of ἀπογράφειν. We have already noted the use of this verb in the middle voice as a technical term for the initiation of a homicide prosecution.⁶⁵ But here for the first time the active is used to describe the 'listing' by a *μηνυτής*⁶⁶ or the author of an *εἰσαγγελία*⁶⁷ of the names of persons charged with a crime. That ἀπογράφειν denotes a step subsequent to the initial 'information' will be clear from a perusal of the passages cited. The ἀπογραφή appears to have been recorded in writing and to have constituted a document, or entry in the records, quite distinct from the *μήνυσις*.⁶⁸ At first sight, one is tempted to infer from the use of the active that the informer himself wrote the list, and to conjecture that the handing in of a written complaint may have had its beginning in *μήνυσις*. But it is rather unlikely that the

⁵¹ Fr. 4 (Blass; Harp. s.v.).

⁵² 6, 35 ff. (*passim*). It is rather curious that the middle is used of the magistrate as well as of the litigant. But the middle and active voices of this particular verb are repeatedly used with no apparent distinction of meaning. See Lipsius, 301, n. 10; *infra*, p. 186.

⁵³ [4, 9. 35].

⁵⁴ 1, 119 ff.

⁵⁵ 1, 120 f. 124.

⁵⁶ 1, 22. 94.

⁵⁷ [4, 17].

⁵⁸ 1, 17. 76. 105.

⁵⁹ 1, 8. 71. 76. 105. 121; 2, 14. In the case of many of the words cited in the following notes, it should be kept in mind that we are dealing with extraordinary proceedings and the exercise of special powers.

⁶⁰ 1, 10. 29. 111.

⁶¹ 1, 105; [4, 18].

⁶² 1, 14. 27. 37.

⁶³ 1, 10-67, *passim*.

⁶⁴ 1, 14. 15. 25.

⁶⁵ *Supra*, n. 52.

⁶⁶ 1, 13. 15. 17. 19. 34. 67.

⁶⁷ 1, 43. 47.

⁶⁸ In accordance with the practice usually followed at this time, the record is proved by witnesses or by an appeal to the knowledge of those present in court (cf. Bonner, *Evidence*, 60). But the words (23), ή *μήνυσις τις ἐκή ἐστιν* ή ἀπογραφή, point to the latter as a document distinct from the *μήνυσις* (cf. 28: ἀκούσαντες τὰς *μηνύσεις* ἢ *ἐκάστος ἐμήνυσε*).

practice originated in connection with such a proceeding as *μήνυσις*, where the informer was frequently a slave or an alien. It is more probable that the names were written down by the clerk, as they were divulged by the informer in the course of the examination, and that the use of the active results from the fact that *ἀπογράφειν* already means 'to list,' 'to report,' while the middle is more commonly employed of having an item entered in a list. I have already directed attention to the unusual confusion of voices exhibited by the technical legal uses of this verb. It is perhaps to be ascribed to the circumstance that the meaning which was already attached to *ἀπογράφειν* in common speech did not accord with the distinction usually made in legal phraseology between the active and the middle.⁶⁹

The speeches extant under the name of Lysias cover a period of approximately thirty years commencing probably in 410/9; one only, however, is earlier than the year of Euclides.⁷⁰ In them are found *δικάζεσθαι*,⁷¹ *προσκαλεῖσθαι*,⁷² *λαγχάνειν*,⁷³ all both with and without *δίκην*, *ἐγκαλεῖν*⁷⁴ and *ἐγκλημα ποιεῖσθαι*,⁷⁵ *ἐπεξέρχεσθαι*,⁷⁶ *διώκειν*,⁷⁷ *αἰτιᾶσθαι*,⁷⁸ *γράφεσθαι*⁷⁹ with or without *γραφήν*, *ἀπογράφειν*,⁸⁰ *μηνύειν*,⁸¹ *ἀπάγειν*,⁸² *ἐνδεικνύναι*,⁸³ *ἐν ταῖς εὐθύναις κατηγορεῖν*,⁸⁴ *ἐπισκήπτεσθαι*.⁸⁵

Although Isocrates was younger than Lysias, his extant forensic speeches fall within the ten years that followed the restoration. The language in which he describes the commencement of actions is marked by considerable variety.

⁶⁹ *Supra*, p. 185, n. 52.

⁷⁰ *Or.* 20 is dated 410/9 by Blass; Jebb puts it between 411 and 407.

⁷¹ 1, 44; 10, 2. 9. 11. 12. 23; [11, 6. 8]; 12, 4; 13, [65]; 17, 5; 21, 18 (pass.; cf. L. & S.); fr. 1, 1. 3 Thal.; fr. 3; fr. 27.

⁷² [6, 11]; 21, 19; 23, 2 (*ter*).

⁷³ [6, 11]; 17, 3. 5. 8 (pass.); 23, 1. 3. 4. 5. 13; fr. 16, 1.

⁷⁴ 3, 19; 5, 3; 19, 55.

⁷⁵ 3, 1; cf. 16, 10: *ἐγκλημα γενέσθαι*.

⁷⁶ 10, 2. 31: 27, 15.

⁷⁷ 10, 11. 12. 31; [11, 12]; 15, 1; 32, 2.

⁷⁸ 7, [17]. 38. 40; 19, 44.

⁷⁹ 1, 44; 13, [65]. 73; fr. 8; fr. 26 a.

⁸⁰ 7, 2. 29; 17, 4; fr. 26 a; in connection with *μηνύσις*, *Or.* 13, *passim*.

⁸¹ *Or.* [6] and 13, *passim*; 5, 5; 7, 16; 29, 6.

⁸² 10, 10; [11, 5]; 13, 68. 86.

⁸³ [6, 15. 30] (pass.).

⁸⁴ 10, 16.

⁸⁵ 3, 39.

We find δικάζεσθαι,⁸⁶ δίκην λαγχάνειν,⁸⁷ δίκην γράφεσθαι,⁸⁸ δίκην εἰσελθεῖν,⁸⁹ ἐγκαλεῖν,⁹⁰ ἐπιδικάζεσθαι⁹¹ and ἀμφισβητεῖν,⁹² διώκειν,⁹³ γράφεσθαι,⁹⁴ εἰσαγγέλλειν,⁹⁵ φαίνειν⁹⁶ and φάσιν ποιεῖσθαι,⁹⁷ ἀπογράφειν,⁹⁸ γραφήν εἰσελθεῖν.⁹⁹ I find nothing in the forensic orations that suggests the writing of pleadings by the litigants.

In the speeches of Isaeus there are of course a great many allusions to the commencement of suits for inheritances, ἀμφισβητεῖν, ἐπιδικάζεσθαι, κλήρου λαγχάνειν, and equivalent expressions. We note also most of the words and phrases usually employed of other forms of action, but find nothing materially different from the language of the earlier orators until we come to one of the later speeches, that *On the Estate of Hagnias*. Here, however, the speaker, describing the formulation of the pleadings in an inheritance case by the claimants or their representatives, in each instance uses the active verb γράφειν. He has just used the technical term for pleading, ἀντιγράφεσθαι, and there can be little doubt that he has in mind the actual writing by himself and the representatives of the other claimants.¹⁰⁰ The date of the speech falls between 360 and 358,¹⁰¹ which brings us within the period of Demosthenes' forensic activity.

⁸⁶ 18, 2. 4. 19; with δίκην, 51.

⁸⁷ 16, 2; 17, 21. 22 (pass.). 31; 18. 7. 11. 23. 52.

⁸⁸ 18, 12. Here γράφεσθαι means, as in the case of public actions, to get the magistrate to enter the cause (cf. *supra*, pp. 178 f.), for it clearly refers to a repetition of the proceeding described in the preceding section by the words λαγχάνει δίκην. (However, see Wyse, *Isaeus*, 588 f.) The expression is unusual (cf. Lipsius, 264, n. 1) of private actions; it was avoided no doubt because of the technical legal implications of γράφεσθαι.

⁸⁹ 18, 24. 38.

⁹⁰ *Or.* 17 and 21, *passim*; 18, 7. 14. The word is sometimes used of the demand that precedes the filing of the complaint (e.g. 18, 7), and sometimes refers loosely to the commencement of an action.

⁹¹ 19, 3. 48.

⁹² *Ib.*, *passim*.

⁹³ Ο διώκων and ο φεύγων are the usual terms for 'plaintiff' and 'defendant.'

⁹⁴ 20, 2.

⁹⁵ 16, 6.

⁹⁶ 17, 42.

⁹⁷ 18, 6. 8.

⁹⁸ 18, 23.

⁹⁹ 18, 51.

¹⁰⁰ 11, 17 f.

¹⁰¹ Wyse, *Isaeus*, 677; Blass, *Att. Bered.* II (1892), 566 f.; Jebb, *Att. Or.* II (1893), 359; Thalheim (ed. 1903), p. XXXVIII.

When we come to Demosthenes, we find represented, naturally enough, the words and phrases that were customary with his predecessors, but with the striking addition of such expressions as *γραφὴν ἀποφέρειν*,¹⁰² *ἔνδειξιν διδόναι*,¹⁰³ and *φάσιν διδόναι*.¹⁰⁴ In some of these passages the actual handing in of the document is described with a precision that leaves nothing to be desired. For example, we read, *ταύτην τὴν φάσιν . . . ἔδωκε μὲν οὗτος προσκαλεσάμενος τὸν Μίκωνα, ἔλαβε δὲ ὁ γραμματεὺς ὁ τῶν τοῦ ἐμπορίου ἐπιμελητῶν*, and *προσκαλεσάμενος τὸν Πολύευκτον ἀποφέρει γραφὴν κατ’ αὐτοῦ κακώσεως πρὸς τὸν ἄρχοντα καὶ δίδωσι τὴν λῆξιν Μηνσαρχίδῃ τῷ παρέδρῳ*. In the light of such language as this we cannot doubt that *λῆξιν δέχεσθαι* denotes the act of receiving the document.¹⁰⁵ Furthermore, we now note repeated allusions in unmistakable terms to the writing of pleadings by the litigants. 29, 30: *τὴν δίκην ἔλαχον . . . ἔκαστον ἐγγράφας*. 32, 4: *διν καύτὸς ἔγραψεν ἐν τῷ ἐγκλήματι ὡς ἐν τῷ πελάγει ἀπώλετο (πῶς δέ, οὐ προσέγραψεν)*. 32, 27: *ἄγεγραφεν οὗτος εἰς τὸ ἐγκληματικόν*. 36, 20: *δίκας λαγχάνων πολλὰ χρήματα εἰσπέπρακται γράφων εἰς τὰ ἐγκλήματα*. 37, 23: *οὐδαμοῦ γάρ (sc. τοῦ ἐγκλήματος) ὡς ἐγώ τι πεποίηκα τούτων* (cf. *ὑπογράφας* and [24] *γεγραφέναι, ἐνέγραψεν*). 38, 14: *γεγράφασιν εἰς δινοῦ ἐγκληματικόν*. [34, 16–17]: *τοῦτο τὸ ἐγκληματικόν γράφον ἐγώ . . . τοιοῦτο γράφειν ἐγκληματικόν . . . ἐν τῇ παραγραφῇ γράψαι . . . ταῦτ’ ἐμοῦ διαρρήδην γράψαντος εἰς τὸ ἐγκληματικόν*.¹⁰⁶ In one instance, the complaint in an *ἔνδειξις* is written by the plaintiff's father: *ταῦτα πρῶτα γράψας εἰς τὴν ἔνδειξιν ἔδωκεν ὁ πατήρ μοι*.¹⁰⁷ It is highly significant that *ἐγκληματικόν*, which with the predecessors of Demosthenes never, so far as I have observed, refers to a document, has now come to be used of the written complaint filed by the litigant.

¹⁰² 19, 257; 23, 5; 27, 12 (of the complaint in a private action; cf. Lipsius, 263, n. 1); [58, 32, 46]; 18, [54, 105]; [26, 8, 11].

¹⁰³ [Dem.] 58, 1.

¹⁰⁴ [Dem.] 58, 8.

¹⁰⁵ 39, 17.

¹⁰⁶ Cf. 45, 46: *τῶν ὑπὸ τούτου γραφέντων εἰς τὴν ἀντιγραφὴν*. For the writing of a *διαμαρτυρία*, cf. [Dem.] 44, 48, 51, 54. See also [Dem.] 52, 14: *λαχῶν δὲ παρὰ μὲν τοῦ διαιτητοῦ ἀνελετο τὸ γραμματεῖον, κ.τ.λ.*

¹⁰⁷ [Dem.] 58, 5.

In the predecessors of Demosthenes we find the pleadings described frequently by ἀντωμοσία,¹⁰⁸ and such expressions as ἀ ἀντώμοσαν, ἀ ἀντωμόσαντο, ὡσπερ ἀντωμόσαμεν, ὅπερ ἀντώμοσα, κ.τ.λ.¹⁰⁹ It is strikingly significant that these expressions have practically disappeared by the time of Demosthenes, for I have been able to find but one case in the Demosthenic corpus and none in the contemporaries of Demosthenes.¹¹⁰ Their place is taken by the allusions to the writing of the complaint that have just been quoted. This does not mean that the verification of pleadings by oath had been discontinued, but it does show that in the earlier period the litigant's responsibility for the content of his pleading is established by the oath,¹¹¹ whereas in the time of Demosthenes the outstanding fact is that the statements in the pleading are written by his own hand.

Similar evidence is found in the contemporaries of Demosthenes. Aeschines uses the phrase γραφὴν ἀποφέρειν four times in the speech *Against Ctesiphon*.¹¹² In Lycurgus¹¹³ and Hyperides¹¹⁴ we find a number of allusions to the writing and handing in of complaints by the accuser.

As the result of our inquiry, then, we find in the forensic speeches of Antiphon, Andocides, Lysias, and Isocrates a studied variety of expression for the commencement of actions, but nothing that may be construed as an allusion to the writing or handing in of pleadings by litigants. But with the advent of Demosthenes new terms make their

¹⁰⁸ Plato, *Apol.* 19 B, 24 B; Isae. 3, 6; 5, 2. 4.

¹⁰⁹ Isoc. 16, 2; 18, 37; Isae. 5, 1; 9, 1. 34; cf. Isae. 5, 4; Antiphon, 1, 8.

¹¹⁰ [Dem.] 43, 3. Here I have depended on the indices, as the greater part of my reading was done before this point took definite shape in my mind.

¹¹¹ Cf. Plato, *Apol.* 27 C: ταῦτα καὶ διωμόσω ἐν τῇ ἀντιγραφῇ. Lys. 23, 13: ἐν τῇ ἀντωμοσίᾳ τῆς δίκης . . . ἀμφισβητῶ.

¹¹² 217, 219 (*bis*), 227.

¹¹³ *Ag. Leoc.* 137: ἐρωτῶντες, διὰ τὸ οὐκ ἐνέγραψα τοῦτο εἰς τὴν εἰσαγγελίαν.

¹¹⁴ 2, col. 47, 9: ὡσπερ Ἀριστων ἐν τῇ εἰσαγγελίᾳ γράφει· 2, 12: εἰσαγγελίαν δέδωκας . . . ἵνα . . . ἔξη σοι τραγῳδίας γράψαι εἰς τὴν εἰσαγγελίαν· 3, 29 f.: τὴν εἰσαγγελίαν ἔγραψα δικαίων καὶ ὡσπερ ὁ νόμος κελεύει . . . καὶ οὐδὲ ὅντως ἀπέχρησέ μοι τὴν εἰσαγγελίαν δοῦναι, ἀλλ' ὑποκάτω παρέγραψα . . . εἴτα τὸ ψήφισμα αὐτοῦ ὑπέγραψα· . . . καὶ ἔστι μοι πεντάκις ἡ ἔξικις τοῦτο γεγραμμένον, κ.τ.λ.

appearance; we find for the first time *ἀποφέρειν* and *διδόναι*, together with accounts of the actual handing in of the instrument and frequent allusions to the writing of complaints by litigants. In the predecessors of Demosthenes references to pleadings take the form 'this is what he swore'; in the later orators, 'this is what he wrote.' Such striking changes in legal phraseology, where usually change is slow to come and old formulas are reluctantly abandoned, cannot be purely fortuitous. We are forced to the conclusion that in the time of the earlier orators complaints were still made orally and were written down by the court officials, and that the practice of handing them in in writing was introduced in the fourth century, probably not long before the commencement of Demosthenes' career.

The instances cited cover many different forms of action, both public and private, and exemplify various kinds of pleadings—complaints, answers, and special pleas. It is evident that all pleadings, and not complaints only, were filed in this manner. From this we may reasonably infer that the practice was not merely a matter of usage but was definitely prescribed by legal enactment.

It now remains to be seen whether we can fix the date of this enactment any more precisely. It is presumably earlier than 364, the year in which *Demosthenes vs. Aphobus* was tried, and there is some ground for believing that the new mode of filing complaints was in effect shortly after 370.¹¹⁵ On the other hand, we have found no hint of the practice in the speeches of Lysias, which bring us well down toward 380. One cannot fail to be struck by the fact that here we have approximately the dates reached by Bonner in his investigation of the time at which the writing of evidence was first required. "It was later," he concludes, "than 380 B.C., when the public career of Lysias was ended, and earlier than the bulk of the speeches of Isaeus."¹¹⁶

¹¹⁵ In Dem. 36, 20 we have a specific allusion to Apollodorus' writing of the complaints in the numerous actions he brought against his father's debtors. A good proportion of these suits were no doubt commenced soon after the latter's death in 370 ([Dem.] 46, 13).

¹¹⁶ *Evidence*, 47.

When we examine the works of Isaeus more in detail, we find no instance of the reading of a deposition that appears to antedate 380 save one in the fifth speech, which is generally assigned to the year 389.¹¹⁷ In all but one of the speeches that are dated later than 375 depositions are read by the clerk, and the practice is clearly well established.¹¹⁸ The tenth, which may be as early as 378, makes no allusion to written depositions. The isolated instance of the reading of a deposition in 389 certainly does not justify us in dating the change, with Leisi, as early as 390, for there is not the slightest reason why evidence should not occasionally have been presented in writing prior to the enactment of a legal requirement that it be so presented. In fact, the requirement by law of a mode of presentation that had never been employed at all would be distinctly remarkable.¹¹⁹

Thus we find that the evidence for written depositions, as well as for the filing of written complaints, points to a date not long after 380. So important a change as this, which required both pleadings and evidence to be in writing, may well have formed part of a general revision of judicial procedure. Now we know that at some time between 388 and the middle of the fourth century the system of drawing dicasts for the courts was changed, so that the ten sections

¹¹⁷ See Wyse, *Isaeus*, 405. Benseler (*De hiatu*, 185 ff.) contends for 372, but the majority of scholars accept the earlier date.

¹¹⁸ Jebb dates the eighth speech in 375. All the others except the fifth and the tenth seem to be later. The first contains no allusion to the reading of depositions.

¹¹⁹ Leisi's suggestion of 390 as the date of the change, based on the deposition in Isae. 5, 2, has been accepted by Bonner ("Evidence in the Areopagus," *Class. Phil.* VII (1912), 450, n. 1) and Lipsius (883). But the considerations outlined in the text have convinced me that a mistake has been made in dating the change so far back on the strength of a single isolated example. Naturally the allusions to testimony are many times as numerous as those to pleadings, and, when once the writing of depositions has been required by law, evidence of the new practice is met at every turn. Thalheim came very near the facts when he suggested 375, though his rejection of the words *καὶ μοι ἀνάγνωθι τὴν μαρτυρίαν* as an interpolation is unnecessary (rev. of Bonner, *B. Ph. W.* xxv [1905], 1575).

into which the available dicasts were grouped were no longer assigned *en bloc* to the several courts, but the courts were filled from the whole heliaea without regard to sections.¹²⁰ No attempt has been made, so far as I am aware, to fix the date of this important change more precisely, or to suggest for it any other motive than the general desire to make the bribery of dicasts more difficult.¹²¹ However, a very cogent reason for the change can be discovered, and that too in a year when important constitutional reforms were taking place at Athens. In the archonship of Nausinicus, 378/7 B.C., Athens was organizing her second league and straining every nerve to prepare for war with Sparta.¹²² It was a time of reform and reconstruction for the three leading states of Greece. Athens completely reorganized her fiscal system and established the symmories. Furthermore, a resolution was passed providing for the enrollment of 20,000 hoplites and 500 cavalry, and for manning 200 triremes.¹²³ Whatever may have been the available man power of Athens at this time, mobilization on such a scale would strain her resources to the utmost. The dicastic sections would undoubtedly be so reduced that a single section would often not suffice for the trial of even a private suit.¹²⁴ If an attempt was to be made to prevent the complete suspension of the courts, a way had to be found in which to meet the exigencies of the situation. What could have been more effective than the very change of which we have been speaking, to disregard the sections and empanel courts from all the dicasts who presented themselves? I can think of no time in which this reform could have been more urgently needed than in the year 378/7.

¹²⁰ Lipsius, 139 ff., esp. 149 f. The new system seems to have been in effect when Isocrates' *Areopagiticus* was written (*ib.* 149, n. 48).

¹²¹ Gilbert, *Constitutional Antiquities* (trans.), 396.

¹²² Grote, *Hist. of Greece* (London, 1852), x, 139 ff., esp. 151 ff.

¹²³ Diod. xv, 29, 7.

¹²⁴ As a practical illustration of the interference with the sittings of the courts that sometimes resulted from a state of war, we have the suspension of private actions in 368 (Dem. 45, 3 f.). See also Dem. 39, 17, where suspension of the courts is made necessary by the expense of military operations.

Here again we come back to the years immediately following 380. This time is indicated by three distinct lines of investigation for three important changes in the judicial system. On such a problem one may well hesitate to speak dogmatically. But I wish to present emphatically the probability that in the year of Nausinicus, along with other reforms introduced in the interest of war-time efficiency, there was a general revision of the judicial system, which included the change in the method of empaneling courts and the enactment of the prescription that pleadings and evidence must be presented in writing.